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DEPARTMENT FOR EUR (DICARLO), EUR/SCE (HOH/FOOKS), NSC FOR BRAUN

E.O. 12958: DECL: 11/07/2017

TAGS: BK PGOV PREL

SUBJECT: LEGAL TALKS CONCLUDE - DODIK LOOKS HEADED FOR CONFRONTATION

Classified By: Ambassador Charles English. Reasons 1.4 (b), (d)

Summary

¶1. (C) On November 6, talks between OHR lawyers and RS government experts, with the goal of resolving RS concerns over the High Representative's October 19 measures, concluded without agreement. The same day, the OHR Legal Advisor, on instructions from the High Representative, informed Steering

Board Ambassadors that OHR had offered to include a legally binding "authentic interpretation" attached to the text of the Bonn Powers imposition, providing additional clarification not included in the original October 19 announcement. The OHR Legal Advisor added that the High Representative believed the talks had gone as far as possible and it was now up to the RS government to accept or reject the interpretation. Lajcak said that Dodik had agreed to provide a response by November 9. In response to RS demands, the interpretation includes provisions giving an initial role to the entities in forming a Council of Ministers quorum. This language, if accepted, could simultaneously be trumpeted by Dodik as a key concession and aggravate Bosniak political leaders, particularly Silajdzic. Despite this extraordinary attempt to forestall an RS boycott, the High Representative is nonetheless increasingly of the belief that Dodik is determined to engineer a confrontation with OHR and the international community. In this context, OHR will broach at the November 8 Quint talks the use of punitive measures by PIC capitals in response to Dodik's anti-Dayton behavior.

End Summary.

The October Measures

¶2. (C) Since the October 19 announcement by the High Representative of his intention to impose changes in the law on the Council of Ministers and the Rules of Procedure for Parliament, Serb political leaders have maintained that the measures create the possibility for Federation-based parties to convene the Council of Ministers (CoM) and approve decisions without the presence of Serb representatives. Despite an October 26 "explanatory note" from the High Representative to RS officials specifying that existing parliamentary safeguards of constituent peoples' interests,

such as entity voting and vital national interest vetoes, remain in place, RS officials have been adamant in asserting that the possibility exists for the RS to be bypassed in approving legislation and government decisions.

Legal Talks: Background

13. (C) Legal discussions have been ongoing since the RS government and the RSNA on October 29 rejected the High Representative's explanatory note. On November 6 the OHR Legal Advisor, on instructions from the High Representative, told the PIC Steering Board Ambassadors that in the final session of the legal talks OHR lawyers had offered Dodik a proposal to issue an "authentic interpretation" of the measures. This interpretation, which would have legal standing through its association with the decision, would specify that, in order to convene a session of the Council of Ministers, at least one member of each constituent people and one member from each entity must be present. If these conditions cannot be met, the interpretation would oblige the Chairman to postpone the session for seven days after which the original terms of the October 19 measures would apply, specifically that quorum requirements would be met as long as one member of each constituent people was present, with no mention of any requirement for entity representation.

A New OHR Concession

14. (C) The interpretation was designed to counter RS objections that the October 19 measures raised the possibility that a hypothetical Serb Minister from a Federation-based party in some future government could be used to achieve a quorum, thereby allowing the CoM to bypass RS representatives. Although RS parties could still avail

themselves of Parliamentary procedures on entity voting or by invoking a vital national interest veto to prevent the adoption of legislation under these circumstances, OHR resolved to provide Dodik with the maximum latitude to declare that RS concerns had been resolved. OHR tells us that while there is no precedent for a High Representative supplementing a Bonn Powers imposition with a binding interpretation, the mechanism is legal and consistent with his mandate.

Entity Provisions

15. (C) The last-minute inclusion of the provision ensuring entity participation on the CoM responded to a broader proposal by SNSD representatives early in the legal discussions. By acquiescing to such a measure the High Representative, in effect, has codified a protection of entity rights in the Council of Ministers where none existed before. We must note, however, that such a provision requires only that the CoM session in question be postponed seven days, after which the session can be convened with only one member of each constituent people as provided in the Lajcak measures. OHR staff have acknowledged to us that the step was "pushing the limits" but demonstrated the High Representative's determination to go "as far as humanly possible" to avert a confrontation.

Mixed Signals from Dodik

16. (C) Since the beginning of RS-OHR legal talks, statements by Milorad Dodik regarding his willingness to de-escalate the crisis have varied widely depending on the venue and interlocutor. The High Representative told the Ambassador that during a November 6 meeting Dodik appeared set on a course of confrontation. Incongruously, during a meeting with the Ambassador that immediately followed the meeting with Lajcak, Dodik stressed he was seeking to avoid confrontation and aware that he would ultimately have to accept the October 19 measures with no mention in the

decision of an entity role in the CoM. Although Dodik committed to the High Representative that he would deliver a formal response to the interpretation by November 9, in public statements Wednesday he seemed to lean toward rejection, stating that legal interpretations were insufficient to eliminate the possibility of outvoting in state institutions. His tone in recent days, though, has been more moderate than in previous statements. It remains possible that he could spin the "authentic interpretation" as part of the decision proper, thus claiming an effective modification of the decision.

The Way Forward

17. (C) On balance, it appears likely that Dodik will engineer a confrontation with OHR and will reject the offer of the authentic interpretation. This will raise the tactical question of how to proceed both in our interactions with OHR and bilaterally with the RS. An outright rejection would, in our view, require punitive measures against Dodik both by the HiRep and by PIC Steering Board Members. During a digital video conference with the Quint on November 8, the High Representative will raise for the first time "red lines" that would trigger actions such as the imposition of sanctions against Dodik.

Comment

18. (C) In meeting Dodik's demand to include mention of the entities in the legal interpretation of the October 19 measures, the High Representative has simultaneously given Dodik a face-saving concession and given an opportunity to Bosniak political leaders, particularly Silajdzic, to enter the debate in unhelpful ways. If Dodik accepts the interpretation he will have achieved the introduction of a provision, nominal as it may be, that offers an explicit role to the entities in the executive branch of state level government. Dodik would have the option of using this

concession as a public relations victory in his efforts to protect the legal status of the RS. At the same time the introduction of such language will be anathema to Haris Silajdzic and SBiH who will surely spin it as another legitimization of the RS as a creation of genocide.

19. (C) Comment Continued: If Dodik refuses the HiRep's forward-leaning compromise and forces a confrontation, we must be prepared to respond with sanctions, calibrated to the actions he pursues to frustrate the workings of Bosnia's state-level institutions. We understand that Washington is now considering a package of possible measures. We ask for swift approval, to allow us to provide the HiRep with our full - and meaningful - support as he attempts to enforce his authorities under the Dayton Accords. Our ability to respond in such support is critical to the HiRep's credibility - and to our ability to assure that Bosnia-Herzegovina remains a viable state. End Comment.

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